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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES OF AMERICA,

Petitioner,

—v.—

CHARLES W. RAMSEY and JAMES W. KELLEY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus[1/]

The American Civil Liberties Union is a nationwide, nonpartisan organization of

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1/ Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

over 250,000 members, dedicated solely to defending the principles embodied in the Bill of Rights to the Constitution. Central among those protections are the safeguards of privacy set forth in the Fourth Amendment. That Amendment erects a critical barrier between the government and the citizens, with well-defined procedures and standards which the government must follow whenever it seeks to intrude upon the "right of the people to be secure in their persons, houses, papers, and effects. . . ."

In recent years, the Fourth Amendment's barrier has, regrettably, been lowered considerably. The ACLU has repeatedly urged the Court to resist such "hydraulic pressures" to weaken the right of privacy which Mr. Justice Douglas warned against in Terry v. Ohio, 392 U.S. 1, 39 (1968). Now, once again, an assault on the Fourth Amendment is being made, this time in an effort to remove from the protections of the Fourth Amendment a whole category of governmental intrusions on privacy, namely, the privacy of international letter mail. We submit that the values protected by the Fourth Amendment, as additionally informed in this case by those interests protected by the First Amendment, require the rejection of this most recent effort to render the right of privacy largely meaningless.

Statement of the Case

This case involves the opening by customs officials of international letter mail without a search warrant. The mail so opened was found to contain a white substance believed to be heroin. The opening of the mail ultimately led to the arrest and conviction of the respondents. The Court of Appeals subsequently ruled that the warrantless search of the envelopes violated the Fourth Amendment and could not be justified by application of a "border search" doctrine, or by the asserted practical difficulties of obtaining search warrants. The Court of Appeals felt that its ruling was also required by the separate interests protected by the First Amendment.

Summary of Argument

The interests protected and the analysis required by the Fourth Amendment are fully applicable to this case. The fact that the focus of the inquiry is letter mail sent from abroad in no way alters that analysis.

The values of both the First and Fourth Amendments create a justifiable expectation of privacy in and the right to communicate through sealed international letter mail. Ex Parte Jackson, 96 U.S. 727 (1878); Procunier v. Martinez, 416 U.S. 396 (1974); Lamont v. Postmaster General, 381 U.S. 301 (1965).

Searching international letter mail without a warrant is per se unreasonable under the Fourth Amendment and does not fall within any of the "jealously drawn" exceptions to that requirement. Camara v. Municipal Court, 387 U.S. 523 (1967); Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. United States District Court, 407 U.S. 297 (1972). Moreover, insisting on a warrant requirement would not frustrate the achievement of important governmental purposes. And any inconvenience of a warrant requirement cannot justify dispensing with it. Similarly, reliance cannot be placed on the good faith of the customs officials, with post-search judicial review the only safeguard employed.

The interests in free communication protected by the First Amendment provide additional and powerful reasons for adhering to Fourth Amendment requirements where international letter mail is concerned. Procunier v. Martinez, supra; Lamont v. Postmaster General, supra. The procedural safeguards associated with attempted restrictions on communication, plus the requirement that the least drastic alternatives be employed, combine to require that Fourth Amendment safeguards be honored. Roaden v. Kentucky, 413 U.S. 496 (1973); Shelton v. Tucker, 364 U.S. 479 (1960).

International letter mail should not be opened in the absence of probable cause, a standard readily applicable to such mail.

The factors and conditions which have been used to justify "border searches" of incoming travellers, without search warrants or probable cause, are inapplicable to and do not justify the warrantless searching of international letter mail. United States v. Martinez-Fuertes, 96 S.Ct. 3074 (1976); United States v. Ortiz, 422 U.S. 891 (1975); Terry v. Ohio, 392 U.S. 1 (1968).

Finally, should it be necessary to reach the question, we submit that there should be no total "border search" exception to the normal requirements of the Fourth Amendment. That Amendment requires a much more discriminating inquiry into the nature of and reasons for departing from normal standards in a particular category of cases. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

ARGUMENT

THE OPENING OF INTERNATIONAL LETTER MAIL WITHOUT A WARRANT AND PROBABLE CAUSE VIOLATES THE FOURTH AMENDMENT

Introduction

The interests protected by the Fourth Amendment are squarely involved in this case and severely jeopardized by the Government's assertions. The purpose of the Fourth Amendment is "to maintain inviolate large areas of personal privacy." Mapp v. Ohio, 367 U.S. 643, 657 (1961). It protects the people

wherever they harbor a justifiable expectation of privacy, whether on a public street, Terry v. Ohio, 392 U.S. 1 (1968), or in a pay telephone booth. Katz v. United States, 389 U.S. 347 (1967).

Just as the Fourth Amendment's protections belong to all people, its prohibitions act as a bar to all governmental invasions of protected privacy. As the Court stated nearly a century ago, the Fourth Amendment applies:

> ...to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.... Boyd v. United States, 116 U.S. 616, 630 (1886).

Moreover, its reach extends beyond our national boundaries, restraining governmental conduct abroad as well as at home. See, e.g., Reid v. Covert, 354 U.S. 1, 6, 8-9 (1957); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976). As the Court stated in Reid v. Covert, supra at 5-6:

> [W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. (footnotes omitted)

The issues in this case must be addressed with these principles in mind. But the Court should also bear in mind that the Fourth Amendment safeguards sought to be imposed here would not prohibit all searches of international letter mail, but only those which are "unreasonable," i.e., not based upon a warrant and probable cause. The Fourth Amendment has struck the balance between the privacy of the individual and the interests of the state. We only ask that that balance be honored and respected.

A. The values of the Fourth Amendment, informed by those of the First Amendment, create a justifiable expectation of privacy in sealed international letter mail.

Despite the Government's assertions,

both the sender and the recipient have a substantial interest in preserving the privacy of international communication by letter. See Procunier v. Martinez, 416 U.S. 396, 408-09 (1974). The existence of a protected interest in privacy of communication through domestic mail has long been recognized:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to

> the great principle embodied in the fourth amendment of the Constitution." Ex Parte Jackson, 96 U.S. 727, 733 (1878).

In the century since then, the right to private communication by mail has been scrupulously protected by this Court against all forms of abridgement. See, e.g., Procunier v. Martinez, supra; Blount v. Rizzi, 400 U.S. 410 (1971); United States v. Van Leeuwen, 397 U.S. 249 (1970); Lamont v. Postmaster General, 381 U.S. 301 (1965). Each of these cases recognizes that there is a substantial intrusion on speech protected by the First Amendment when the government opens mail. As Justice Holmes stated: "[T]he use of the mails is almost as much a part of free speech as the right to use our tongues." United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921)(dissenting opinion).

The mail is as important a vehicle of communication as the telephone. The government can no more invade the privacy of communication by the former than it can by the latter. See Katz v. United States, supra. The First Amendment guarantees the right to receive information via both public and private media. E.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-90 (1969); United States v. United States District Court, 407 U.S. 297, 314 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Lamont v. Postmaster General, supra. Knowledge that the omnipresent eye of the

government is free to peer into private correspondence in its unfettered discretion may deter free communication by letter.[1] Thus, the First Amendment combines with the Fourth to protect written correspondence from unjustified intrusion. See Procunier v. Martinez, supra at 408, 409; Lamont v. Postmaster General, supra.

Nor is a contrary result required by the mere fact that mail has crossed our borders instead of our country. The individual interest in shielding correspondence from the unwanted government eye remains the same. International communication of ideas may be as important to free speech as domestic and is entitled to the protections of the First and Fourth Amendments. See, Lamont v. Postmaster General, supra.

Likewise, the governmental interest which justifies the intrusion is the same whether the object of search is domestic or international mail - the general interest in law

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1/ That the envelopes in question here contained no correspondence is not relevant. The rule which the government seeks would apply to all envelopes travelling in international mail regardless of their contents. Giving weight to this fact in effect would be justifying the search by what is turned up, an analysis this Court has steadfastly refused to accept. See, e.g., Sibron v. New York, 392 U.S. 40, 63 (1968); Henry v. United States, 361 U.S. 98, 103 (1959).

enforcement. No less than international mail, domestic mail may often be employed to facilitate criminal enterprises.[2] If the generalized interest in effective law enforcement does not justify blanket invasion of the privacy of domestic mail, it cannot justify such invasion of international mail.

Mail, of course, is not immune from all inspection. When the government has demonstrated that a search of any letter mail is required, individual privacy interests must yield. But it is the Fourth Amendment which must provide both the standard and procedure for determining when the government has made such a showing.

B. The Search of International Letter Mail Without a Warrant is per se Unreasonable.

The "most basic constitutional rule in this area is that '...searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment - subject only to a few specifically established

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2/ Many statutes make it a crime to use the mails for certain purposes. See, e.g., 18 U.S.C. §§871 (use of mails to threaten life of President or his successors), 876 (use of mails for threatening communications), 1461, 1737 (mailing obscene or crime-inciting material), 1952 (use of mail in furtherance of unlawful activity), 2101 (use of mail to incite riot).

and well-delineated exceptions.' The exceptions are 'jealously drawn,' and there must be 'a showing by those who seek exemption... that the exigencies of the situation made that course imperative.'" Coolidge v. New Hampshire, 403 U.S. 443 at 454-55 (1971).

The search of international letter mail does not fall within any of the heretofore known, "jealously drawn" and "well-delineated" exceptions to the warrant requirement.3/ Indeed, warrantless search of domestic mail is prohibited, Ex Parte Jackson, supra, and unauthorized detaining and opening of first-class domestic mail is subject to criminal sanctions. 18 U.S.C. §§1701-03.

The Government is asking this Court to create a new exception to these rules by insisting on the claimed importance of searching international mail. However, as this Court has consistently made clear:

3/ See, e.g., United States v. Robinson, 414 U.S. 218 (1973)(search incident to arrest); Chambers v. Maroney, 399 U.S. 42 (1970)(automobile search); Terry v. Ohio, 392 U.S. 1 (1968)(self-protective weapons pat-down); Harris v. United States, 390 U.S. 234 (1968)(plain view); Warden v. Hayden, 387 U.S. 294 (1967)(hot pursuit); Zap v. United States, 328 U.S. 624 (1946)(consent).

> "[T]he question is not at this stage..., whether these inspections may be made, but whether they may be made without a warrant. . . . In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant...." Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

The need to search is not determinative of the legality of a warrantless search. Rather, under the cases, the Court has looked to whether a warrant proceeding would frustrate achievement of the governmental purpose behind the search. E.g., United States v. United States District Court, supra at 315; Camara v. Municipal Court, supra at 533. Amicus submits that subjecting the inspection of international letter mail to the warrant requirement will not frustrate any legitimate governmental interest and is required by the Fourth Amendment as well as by the First.

1. It is possible to obtain a warrant prior to opening international letter mail.

The fundamental rule of this Court's Fourth Amendment jurisprudence is that if it

is possible to obtain a warrant, a warrantless search is constitutionally prohibited. Terry v. Ohio, supra at 20. And this is so even in areas traditionally exempt from the warrant requirement. See, e.g., Coolidge v. New Hampshire, supra, cf., Roaden v. Kentucky, 413 U.S. 496 (1973).

It is possible to obtain a warrant prior to opening international letter mail. Such mail is in the possession and control of postal authorities until it is delivered to the addressee. It cannot be removed from the point of entry except by postal authorities. The Court has held that with respect to sealed mail the right of privacy lies in the secrecy of the contents, and brief detention to obtain a search warrant has been held to be constitutionally tolerable. United States v. Van Leeuwen, supra. Since there is no danger of removal before a warrant may be obtained, there is no need to search without a warrant. The Government does not and cannot argue that the exigencies of international letter mail searches make it "imperative" to dispense with the warrant requirement. Nor does it argue that imposing a warrant requirement on these searches would have the necessary effect of frustrating the purpose for undertaking the searches. For these reasons alone, this Court should refuse to create the exemption sought.

Instead, the Government argues only that the opening of international letter mail ought not to be subject to the warrant

requirement because it would be impractical and inconvenient to obtain a warrant, that customs officials do not open mail which appears to contain only correspondence and that the individual interest can be adequately protected in subsequent judicial proceedings. The history of this Court's decisions interpreting the Fourth Amendment compel the rejection of each of these arguments.

With respect to the Government's claim of inconvenience, we have no doubt that the present practice of opening mail in the unfettered discretion of the customs inspector is more convenient than adherence to the Fourth Amendment. Yet, this Court has never recognized the convenience of law enforcement authorities as a legitimate consideration in applying the Fourth Amendment. The Fourth Amendment "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." United States v. United States District Court, supra at 315. Nearly 30 years ago this Court answered the government's argument pressed here:

> "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons...." Johnson v. United States, 333 U.S. 10, 15 (1948).

When practicality and convenience become the measure of the duty to obtain a search warrant, the Fourth Amendment will cease to exist. As this Court stated in Reid v. Covert, supra:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefits of a written Constitution and undermine the bases of our Government. 354 U.S. at 14. 4/

2. The Fourth Amendment requires a prior judicial determination that search is justified.

The protection of the Fourth Amendment

4/ The Government's convenience argument turns on their claim that each of the 62 customs inspectors who each open an average of 19 letters per day would be unable to do so if they had to get a warrant for each letter. We suspect that the number of letters which inspectors felt the need to open would diminish if they had to obtain a warrant. But, in any event, the inconvenience required to prepare and submit applications for warrants to search such mail cannot displace the requirements of the Fourth Amendment.

consists in requiring that a neutral, judicial officer determine when a search is justified. An executive branch officer engaged in ferretting out customs law violations is not the detached magistrate contemplated by the Constitution:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute.... But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.
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> * * * *
>
> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.
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> United States v. United States District Court, supra at 317 (footnote omitted).

Searches conducted without warrants have repeatedly been held unlawful despite the fact that there was probable cause and the search was reasonably limited in scope. See, e.g., Coolidge v. New Hampshire, supra; Katz v. United States, supra. Even a search authorized by the President and purportedly undertaken for the weighty purpose of safeguarding national security cannot go forward

absent a warrant issued by a neutral, judicial officer. United States v. United States District Court, supra.

The government argues that because customs officers do not open mail containing only correspondence and that they do not read any correspondence in mail opened, the warrant requirement is unnecessary. In effect, this argument is that the initiation and scope of the search of mail ought to be subject only to the good faith discretion of the customs officers. However, this Court has consistently refused to make good faith the measure of the Fourth Amendment. "[S]imple 'good faith on the part of the arresting officer is not enough.'... If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effect,' only in the discretion of the police." Terry v. Ohio, supra at 22 (quoting from Beck v. Ohio, 379 U.S. 89, 97). The whole instinct of the Court's Fourth Amendment jurisprudence is opposed to such reliance on the good faith of law enforcement officials to respect the citizen's right to privacy. See, e.g., United States v. United States District Court, supra.

Similarly, the Court has resolutely refused to accept post-search judicial review as a substitute for objective, judicial predetermination of probable cause. See, e.g., United States v. United States District Court, supra; Katz v. United States, supra. The purpose of the warrant requirement is to prevent unjustified intrusions upon the privacy of citizens. Chimel v. California, 395 U.S. 752, 767, n. 12 (1969). This purpose cannot be accomplished by after-the-fact judicial review. When the Court departs from strict adherence to the warrant requirement, the innocent suffer along with the guilty, because all have been subjected to the indignity of a search without judicial authorization or just cause. Yet for those whose opened mail is found to contain no contraband, there is, in practical terms, no post-search judicial review.

An additional infirmity of post-search judicial review is its unreliability. The accuracy of the customs inspector's recollection of his actions cannot be tested for he is the only witness to the search. Also, after-the-fact justification of the search is likely to be strongly influenced by hindsight.

3. Adherence to the Warrant Requirement would not frustrate the Governmental purpose in undertaking the search of mail.

It is clear that the opening of letter mail entails a substantial intrusion on individual rights and that it is feasible to obtain a warrant before undertaking the search. The sole question remaining is whether imposing a warrant requirement would frustrate the governmental purpose justifying the search either because a search will not be possible if not done immediately or a delayed search will not effectuate the intended purpose.

For example, since an automobile may easily be removed from the jurisdiction before a warrant may be obtained for its search or seizure, if a warrant requirement were imposed on automobile searches the practical result would be to prohibit such searches. See Chambers v. Maroney, 399 U.S. 42 (1970). Likewise, the purpose of a weapons pat-down is to protect a police officer from attack, and if such law enforcement activity were delayed until a warrant could be obtained, the purpose would be frustrated. Terry v. Ohio.

It is apparent, however, that imposing the warrant requirement on customs inspection of letter mail would not in any comparable way frustrate the purposes underlying those searches. There is no danger that mail would disappear before a warrant can be obtained and no need for immediate search. Moreover, assuming that such searches must be based on probable cause, the warrant requirement does not impose any insuperable impediment to effective customs law enforcement, because the authority to undertake warrantless searches is no greater than the authority to search with a warrant. Thus, facts amounting to probable cause for a warrantless search will always justify the issuance of a search warrant. Requiring customs officials to make such a showing to a magistrate will not inherently frustrate the governmental purposes sought to be served.

C. Strict adherence to the warrant requirement is also required by the interests protected by the First Amendment.

Where constitutionally protected speech is involved, the Court has required rigorous adherence to the commands of the Fourth Amendment. E.g., Roaden v. Kentucky, supra; United States v. United States District Court, supra; Stanford v. Texas, 379 U.S. 476, 485 (1965). The First Amendment "calls for a higher hurdle in the evaluation of reasonableness" and the Fourth Amendment warrant requirement is stringently applied because it is necessary to "examine what is 'unreasonable' in the light of the values of freedom of expression." Roaden v. Kentucky, supra at 504. We deal here with letter mail, not crates of machinery. Thus, even if the Fourth Amendment alone did not compel adherence to the warrant requirement, in this context, in conjunction with the First Amendment, it would.5/

The permissibility of governmental action which arguably impinges on free speech under the First Amendment must be determined by reference to a number of rigorous criteria and careful inquiries. See, e.g., Procunier v. Martinez, supra at 411. Yet, the government's argument here seems to be that the inquiry ends once it is determined that the imposition and

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5/ Pornography is the primary contraband seized as a result of these searches. Br. for Petitioner, Appendix B.

collection of customs duties and the exclusion of contraband are within the enumerated powers of the Federal government and that opening international mail is reasonably related to the exercise of this power. But these factors only begin the inquiry, they do not resolve it. See Lamont v. Postmaster General, supra. Notwithstanding that challenged governmental action furthers a substantial, legitimate governmental purpose, under the First Amendment "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted).

The statistics cited by the government show that a large group of innocent people have the privacy of their correspondence invaded each day in order to detect a small minority of lawbreakers. The present practice thus broadly burdens protected speech in which the government has no legitimate interest. Such overbreadth is impermissible where there are alternatives to unrestricted mail opening which are less intrusive on individual rights yet as effectively prevent the importation of contraband and merchandise upon which duty has not been paid.

First, it is extremely important to note that, prior to 1971, the opening of international letter mail without the written consent

of the addressee was prohibited. Under then-applicable regulations, when mail was received without written authorization for pre-delivery opening, customs officials were required to send a notice to the addressee requesting written permission for opening the mail. If such consent was not received, the mail was to be treated as undeliverable. 19 C.F.R. §9.5 (1971). Pertinent postal regulations correspondingly required that:

> Sealed letters and letter packages should bear a green label (Form C1) or an endorsement permitting the customs officer to open the article for examination. In the absense of a label or endorsement, the post office will obtain the addressee's signed authority for opening on Form 2921. "Held Notice - International Mail." If such authority is not granted within 15 days after the first notice, send a second notice. If no response is received after an additional 15 day period, endorse the article "Unclaimed" and return it to origin. 39 C.F.R. §261.3 (1971).

While this procedure was highly questionable under the First and Fourth Amendments - since it permitted a seizure, if not a search, without a warrant or probable cause, it denied addressees their mail in the unfettered discretion of administrative officials, and it encouraged coerced consent to opening - the

very fact that such a cumbersome procedure was employed by the government undermines the contention that requiring a search warrant procedure would unduly burden governmental purposes.

Second, and accordingly, there is the alternative of the warrant requirement applied by the Circuit Court. As has been noted, there is no danger that mail will be delivered to the addressee before a warrant can be obtained, and a warrant may be obtained for the search of any mail for which a search may be constitutionally undertaken. Communication by mail would thereby be protected by the determination of a judicial officer. And, as a practical matter, one would expect that customs inspectors would limit their applications for a warrant to those envelopes which were reasonably likely to contain prohibitable merchandise. This judicial screening and customs self-screening would narrow the sweep of mail openings, and thus more probably confine searches to those items of legitimate governmental concern. In terms of freedom of expression "[b]y no means of least importance will be the reassurance of the public generally that indiscriminate...[mail-opening] of law-abiding citizens cannot occur." United States v. United States District Court, supra at 321. In light of recent revelations of widespread opening and monitoring of outgoing and incoming international correspondence by the CIA, this consideration assumes even greater significance.

D. Probable cause is required for the opening of international letter mail.

As the Fourth Amendment's warrant requirement provides the procedure for determining when the governmental need to search outweighs the individual right to privacy, the probable cause requirement provides the standard for determining when that point is reached.

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. Chambers v. Maroney, supra at 51.

See also United States v. Ortiz, 422 U.S. 891 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

It is readily apparent that the Customs Service does not and probably could not open all of the more than one billion envelopes entering this country from abroad. Nor is there any legitimate governmental need to open mail which contains only correspondence. Therefore, there must be some basis for distinguishing those envelopes for which there is a governmental need to search. Under the Fourth Amendment the standard for selection must be an objective one: "would the facts available to the officer at the moment of

the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, supra at 22. Inarticulate hunches are insufficient justification for intruding on constitutionally protected rights. Id.

The only fact which can justify the belief that it is necessary to open an ordinary letter-size envelope is probable cause to believe that it contains something other than correspondence. The probable cause standard may be meaningfully applied to searches of international letter mail. The size, shape, weight[6] and feel[7] of the envelope, its source and the addressee[8] are all readily determinable and are arguably relevant to the determination of whether it is reasonable to believe prohibited or dutiable merchandise is contained therein.

The government indicates that many mail openings are predicated on mere suspicion and

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6/ See, e.g., United States v. King, 517 F. 2d 350 (5th Cir. 1975).

7/ See, e.g., United States v. Francis, 487 F.2d 968 (5th Cir. 1973), cert.denied, 416 U.S. 908 (1974).

8/ See, e.g., United States v. Van Leeuwen, 397 U.S. 249 (1970); United States v. King, 517 F.2d 350 (5th Cir. 1975).

these searches would be precluded if a showing of probable cause were required. Yet this is precisely the function which the probable cause standard serves - preventing unjustified intrusion upon privacy. Under current practice only 15.7% of all letter openings result in finding contraband or dutiable items. The vast majority of letters are needlessly opened. Thus, raising the standard to exclude those envelopes which are not likely to contain merchandise is appropriate.

The point is that there is nothing about the search of international letter mail which renders use of the traditional probable cause standard inapplicable or unduly burdensome.

E. The opening of international letter mail cannot be justified as a "border search."

Although we believe that there is no "border search" exception to the Fourth Amendment, see infra, pp. 31-38, even if the common practice of cursorily inspecting incoming luggage at the border is an exception to the general rule that searches conducted without probable cause and a warrant are per se unreasonable, the nature of the search of international letter class mail is such that it does not fall within this exception. Numerous factors distinguish the usual border search from the search of international mail. While inspection of the effects of foreign travellers is a longstanding practice, customs inspectors have been opening international letter mail without consent of the

addressee only since 1971. Thus, while a returning traveller might expect a minimal customs inspection on entering the country, a recipient of international correspondence does not expect that his mail is likely to be opened. The presence or absence of awareness that inspection will occur may effect the degree of perceived intrusion. Cf. United States v. Martinez-Fuerte, 96 S.Ct. 3074 (1976); United States v. Ortiz, supra.

Another difference is the degree to which discretion is exercised in the decision to undertake a search. In the ordinary border search, all those persons crossing the border are, or should be, initially subject to the same degree of intrusion. There is at the outset no discretion exercised by the individual customs officer. On the contrary, considerable discretion is exercised by customs officers in determining which international letter mail to open.9/ This Court has considered the element of discretion to select the subject of search a significant factor in determining the applicability of the Fourth Amendment's probable cause requirement. E.g., United States v. Ortiz, supra.

9/ According to the government only 1 in 4,000 envelopes are opened for inspection. Br. for Petitioner, 26.

In addition, ordinary border searches are conducted in the presence of the property owner, who can observe the conduct of the inspection and can object to unnecessary, especially intrusive or arbitrary exercises of the power to inspect. Should question arise of the reasonableness of the official action taken, the aggrieved person will be able to give his or her account of the proceedings. Post-search adversarial judicial review is thus possible. International letter mail openings, in contract, are conducted in secret. There is no one present to oversee the conduct of the search. Post-search judicial review is impeded because the veracity of the customs officer's account of the cause for and the conduct of the search cannot be tested. Cf. United States v. Wade, 388 U.S. 218 (1967).

In the ordinary border search of baggage, two objective facts are in the possession of the customs inspector: that an international border has been crossed and that merchandise is present. In terms of the probable cause equation, only one element is missing - whether that merchandise includes contraband or dutiable goods. The skilled customs officer can observe the behavior of the owner of the baggage and glean further objective facts tending to indicate unlawful conduct. For example, the person may appear nervous or he may respond evasively to the customs officer's inquiries. This sort of evidence and the inferences drawn therefrom may be highly relevant in determining the reasonableness of the

search. See Terry v. Ohio, supra; United States v. Gil de Avila, 468 F.2d 184 (9th Cir. 1972), cert. denied, 410 U.S. 958 (1973). On the other hand, with respect to the search of international letter mail, only one objective fact is always in the possession of the customs inspector - the crossing of an international border. He cannot observe the recipient's behavior. Thus, in conventional probable cause analysis, the search of letter mail proceeds on a lesser showing of justification.

There is a final critical distinction between the usual border search and the opening of international letter mail - the ability to secure a warrant prior to undertaking a search. See Camara v. Municipal Court, supra. When an international traveller presents himself at the border with his baggage, an immediate search is required lest the baggage be removed before a warrant can be obtained. Although arguably the baggage could be seized and held until a warrant is obtained, such a course may well be more intrusive and inconvenient to the traveller than immediate inspection. Cf. Chambers v. Maroney, supra. As has been noted, there is no danger of removal of letter mail before a warrant may be obtained. Immediate search is, therefore, not necessary.

These distinctions between the nature of and reasons for the usual border search and the search of international letter mail take the latter out of the purported border search

exception. Any exceptions to the Fourth Amendment warrant requirement have been scrupulously confined to the circumstances justifying exemption. See, e.g., Roaden v. Kentucky, supra; Coolidge v. New Hampshire, supra. Ritualistic incantation of the words "border search" can no more dissolve the proscriptions of the Fourth Amendment than the words "search incident to arrest," "automobile search," or "national security." Where, as here, the facts and circumstances do not make warrantless search "imperative" there is no justification for departure from the Fourth Amendment's warrant requirement.

F. There should be no "border search" exception to the Fourth Amendment.

Finally, even if the opening and inspection of international letter mail is considered a "border search," this Court has never held that there is a blanket exception to the Fourth Amendment for such searches. Rather, we submit, proscriptions of the Fourth Amendment should apply with equal force to searches conducted at our national borders.

The Court has never held any law enforcement procedure involving an interference with individual liberty and privacy exempt from the Fourth Amendment.[10] Though the specific content and incidents of rights guaranteed by the

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Please see next page for footnote 10.

Fourth Amendment may vary depending on the context in which they are asserted, the proscription of unreasonable searches and seizures, defined with reference to the warrant and probable cause requirements, must be applied. E.g., United States v. Ortiz, supra; Almeida-Sanchez v. United States, supra. Nonetheless, relying on dicta in opinions of this Court,[11] some lower federal courts held that traditional Fourth Amendment principles do not apply to searches conducted by customs officers at the border and that these "border searches" may be conducted in the absence of probable cause or reasonable suspicion.[12]

10/ Former cases holding particular practices not subject to the Fourth Amendment have been overruled. See, e.g., Olmstead v. United States, 277 U.S. 438 (1928) overruled in Katz v. United States, 389 U.S. 347 (1967); Frank v. Maryland, 359 U.S. 360 (1959) overruled in Camara v. Municipal Court, 387 U.S. 523 (1967). But cf. Wyman v. James, 400 U.S. 309 (1971).

11/ See, e.g., United States v. 12 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123, 125 (1972); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971); Carroll v. United States, 267 U.S. 132, 154 (1924).

12/ See, e.g., United States v. Milroy, 538 F.2d 1033 (4th Cir. 1976); United States v. Barclift, 514 F.2d 1073 (9th Cir.), cert. denied, 423 U.S. 842 (1975); United States v. Bolin, 514 F.2d 554 (7th Cir. 1975).

In effect, the rule applied by these courts and now urged on this Court is that any search conducted at the border is reasonable under the Fourth Amendment by that fact alone.

One justification proferred for this sweeping and unlimited license to search persons and their effects is the long history of the practice. But a constitutional violation does not become legitimated by virtue of the fact that it has been long practiced. See Brown v. Board of Education, 347 U.S. 483 (1954). And the same is true in the Fourth Amendment area as well. See United States v. United States District Court, supra; Camara v. Municipal Court, supra. More relevant, however, is the historical basis of the Fourth Amendment and the abusive practices which led to its adoption.[13] The Fourth Amendment, in substantial part, grew out of the colonial experience with attempts to enforce the English customs statutes. General warrants, called writs of assistance, were issued to customs officials conferring on them unlimited discretion to search for goods on which customs duty had not been paid. See N. Lasson, History and Development of the Fourth Amendment, Ch. 2

13/ The Fourth Amendment "must be read in light of 'the history that gave rise to the words...'." Chimel v. California, 395 U.S. 752, 761 (1969), quoting from United States v. Rabinowitz, 339 U.S. 56, 69 (1950)(Frankfurter, J., dissenting).

(1937). Opposition to the writs of assistance came to a head in 1761 with James Otis' landmark attack on the general writs in Lechmere's Case. Otis described the writs as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English lawbook." B. Schwartz, The Bill of Rights: A Documentary History 189 (1971). So strong was the colonial opposition to the writs of assistance that John Adams was later to write of Otis' argument, "American independence was then and there born." 10 J. Adams, Works 247.

Thus, if there is any lesson to be drawn from history, it is that general searches by customs officers were considered by our founding fathers as attributes of tyranny and oppression. Fresh with the recollection of the writs of assistance, they enshrined in the Bill of Rights a prohibition of warrantless searches on mere suspicion. See Ker v. California, 374 U.S. 23, 46-64 (1963). The power to conduct border searches which the government seeks here is precisely the power which the founding fathers meant to forever deny the federal government.

The governmental interest allegedly justifying exempting border searches from Fourth Amendment inquiry is the practical need for searches to prevent the smuggling of contraband and dutiable merchandise. The interest in enforcement of the customs and import laws, however, is no more compelling than the interest in enforcement of any other laws. There is a strong interest in preventing bank robbery, yet it cannot seriously be contended that law enforcement officers could stop and search everyone who enters a bank. See Camara v. Municipal Court, supra at 535. Likewise, there are substantial difficulties in enforcing our immigration restrictions, yet the Court refused to dispense with the Fourth Amendment's requirement of probable cause solely on this ground. In Almeida-Sanchez v. United States, the Court said:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certan exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. 413 U.S. at 273.

Underlying the argument in favor of a general exception for border searches is the erroneous assumption that the Fourth Amendment embodies an all-or-nothing approach and thus that all border searches must be reasonable if any border search is. But the constitutional inquiry of reasonableness under the Fourth Amendment is much more discriminating than that. See, e.g., Terry v. Ohio,

supra at 17-18. Recognizing that there are differing degrees of intrusiveness, the Fourth Amendment proceeds as much by limitations on the scope of search as upon its initiation. See Chimel v. California, supra.

When viewed in this context, it is apparent that there are a great variety of encounters between government officials and individuals subsumed within the general rubric of "border searches." Involving, as they do, qualitatively different intrusions on privacy, they should be analyzed separately for Fourth Amendment purposes. Border encounters may be ranged along a continuum relative to their intrusiveness. At one end is the relatively unobtrusive practice of briefly stopping individuals seeking to enter the country from abroad to inspect their passpoarts or other identifying documents. The intrusion entailed by this practice may be so minimal that it is reasonable to stop all those crossing the border without a warrant, probable cause or even particularized suspicion. Cf. United States v. Martinez-Fuerte, supra. At the other end of the continuum are strip searches and body cavity searches, which are so substantial an intrusion on individual privacy and so offensive that they ought not be permitted absent a search warrant issued on the basis of probable cause to believe contraband is concealed on or in the body.[14/] Between these

14/ See, United States v. Cameron, 538 F.2d 254, 258-60 (9th Cir. 1976); Huguez v. United States, 406 F.2d 366, 382, n. 84 (9th Cir. 1968).

two extremes lie cursory visual and tactile inspection of luggage and the unrestrained thoroughgoing and intensive general search of one's person, property and effects. The power to rummage unrestrainedly through luggage, emptying its contents and minutely examining every article, does not necessarily flow from conceding the authority to superficially examine luggage. See Chimel v. California, supra; Terry v. Ohio, supra at 25-26, 28-30; Sibron v. New York, supra at 65-66, 67.

For example, if the ordinary letter-size envelopes involved in this case had been carried into the country in the luggage or on the person of a returning traveller, they could not have been opened and their contents inspected without particularized reason. These ordinary letter-size envelopes probably would not be uncovered absent an unrestrained thoroughgoing general search of the person, his effects and all the contents of his luggage. Even if they would be uncovered, the probability that they contained contraband or merchandise subject to duty is so minimal as to make it unreasonable to open them. Amicus submits that such an intensive general search must be predicated on probable cause to believe that a given individual is engaged in smuggling and that individual containers carried within luggage may be searched only if their size, shape, and other physical characteristics taken together with other facts known to the customs officer make it reasonable to believe that they contain contraband or undeclared merchandise subject to duty.

Similarly, this Court has been sensitive to distinctions in intrusiveness in the closely related area of attempts to enforce our immigration laws. Searches of vehicles, whether by roving patrols or at fixed checkpoints, have been held impermissible in the absence of probable cause to believe here are present aliens who have unlawfully entered the United States. United States v. Ortiz, supra, Almeida-Sanchez v. United States, supra. Brief stops for investigation by roving patrols must be predicated on reasonable suspicion of violation of law, United States v. Brignoni-Ponce, 422 U.S. 873 (1975), but the Court has held that investigatory stops at fixed checkpoints need not be so supported at all. United States v. Martinez-Fuerte, supra.

The point is that concentrating on the label "border search" diverts attention from the appropriate inquiry under the Fourth Amendment - "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Terry v. Ohio, supra at 19. To determine reasonableness it is necessary, inter alia, to balance the need to search against the intrusion on privacy which search entails. Camara v. Municipal Court, supra at 536-37. How that balance is struck differs depending on the degree of intrusion, the degree to which discretion is exercised, and the opportunity to obtain a warrant. The fact that a search occurs at the border ought not to immunize it from this sensitive, judicial, constitutional review.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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